

These are the tentative rulings for civil law and motion matters set for Tuesday, July 2, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, July 1, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

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**EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.**

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**1. M-CV-0056427 Patburg, Gary L. vs. Dechert, Alan et al**

Appearance is required for hearing on defendants' ex parte application for stay of execution of judgment. If defendants did not timely serve the ex parte application as ordered, additional relief will be denied. Proof of service must be filed no later than the time of the hearing.

**2. S-CV-0027927 Walsh, Forrest, et al vs. William Lyon Homes, Inc.**

Plaintiff's Motion for Leave to File Third Amended Complaint is granted. The court's discretion will usually be exercised liberally to permit amendment of the pleadings. *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939. Courts must apply a policy of great liberality in permitting amendments to the complaint "at any stage of the proceedings, up to and including trial," unless prejudice to the adverse party is shown. *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761.

Defendant opposes plaintiff's motion on the grounds that plaintiff does not comply with California Rules of Court, rule 3.1324(b) by submitting a declaration stating why the amendment is necessary and proper, when the facts to be alleged were discovered, and the reasons why the request for an amendment was not made earlier. The court finds that in the case at bar, the deficiencies of the declaration submitted by plaintiff's counsel are not fatal to plaintiff's motion. The information required by Rule 3.1324(b) allows the court to determine whether the moving party unreasonably delayed in seeking leave to amend. However, even assuming plaintiffs unreasonably delayed, leave must still be granted "where the opposing party was not misled or prejudiced by the amendment." *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048. In this case, the amendments at issue include the addition of a separate defendant, and a paragraph relating to the bankruptcy of defendant William Lyon Homes, Inc. Whether such paragraph is subject to a motion to strike is not relevant to a determination of this motion.

*Id.* As there is no showing that defendant would be prejudiced by the proposed amended pleading, the motion is granted.

Plaintiffs shall file their third amended complaint by no later than July 16, 2013.

If oral argument is requested, plaintiffs' request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

**3. S-CV-0029093 Hammer Lane Management, LLC, et al vs. HLMS, LLC, et al**

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, it shall be heard on July 2, 2013 at 8:30 a.m. in Department 42. Plaintiff's Motion for Stay of Proceedings is denied.

The court has the inherent ability to order a stay of proceedings in the interest of justice, and to promote judicial efficiency. *Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489. Plaintiff asserts that the instant action was always meant to trail two related cases filed in Sacramento County, and that adjudications in either of the two Sacramento County cases may render this action moot. All parties agree that adjudication of issues in the related Sacramento County cases may affect the amount of damages sought in the instant case. However, plaintiff's speculation that this action could be rendered moot if he obtains everything he seeks in either of the other actions, does not compel the conclusion that this action should be stayed at this time.

This action has a current trial date of December 2, 2013. A judgment has been issued in the related case of *Hammer Lane R.V. & Mini-Storage L.P. v. HLMS LLC*, and defendants assert that any post-trial motion for attorneys' fees must be filed by August 2, 2013. The other related case of *Hammer Lane R.V. & Mini-Storage L.P. v. Jack S. Johal* is currently set for trial on September 24, 2013. As it currently stands, the related cases will be fully adjudicated prior to trial in this case, and any questions of remaining damages which plaintiff can seek will be resolved. If this is not the case, plaintiff retains the right to seek a continuance of the trial date.

The court also notes that plaintiff has diligently prosecuted this case since its inception, including numerous court appearances for both case management conferences and law and motion hearings, and service of written discovery to the defendants. All defendants have provided discovery to plaintiff, including, according to defendants, the production of over 100,000 pages of documents. Defendants now await discovery responses owed by plaintiff. Given the parties' active participation in this case, as well as the timing of the request, a stay of the action is not warranted in the interest of justice.

If oral argument is requested, defendant's request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

**4. S-CV-0029629 O'Connor, Kenneth, et al vs. Centex Real Estate Corp., et al**

The Motion of Centex Real Estate Corporation and Centex Homes for Determination of Good Faith Settlement is granted. Opposing parties provide no support for their contention that subcontractors may not constitute joint tortfeasors simply because they are named in the cross-complaint, but not the complaint, in a complex construction defect case.

Based on the factors set forth in *Tech-Bilt v. Woodward Clyde & Associates* (1985) 38 Cal.3d 488, the settlement at issue is within the reasonable range of the settling party's proportionate share of liability for plaintiff's injuries, and therefore is in good faith within the meaning of Code of Civil Procedure sections 877 and 877.6.

**5. S-CV-0030677 Macy's West Stores, Inc., et al vs. Roseville Shoppingtown**

This tentative ruling is issued by the Honorable Mark S. Curry. If oral argument is requested, it shall be heard on July 2, 2013 at 8:30 a.m. in Department 32.

Plaintiffs' Motion to Compel Further Responses to Requests for Production and Production of Documents is granted in part and denied in part. Defendants object to production of documents responsive to Request for Production No. 87, which seeks documents relating to any prior lawsuits against defendants stemming from the 2010 Galleria fire. Through meet and confer discussions, plaintiffs' request has been narrowed to seek only pleadings, written discovery and deposition transcripts arising from any such lawsuit. Defendants have identified one prior lawsuit, and have produced pleadings from that action. Defendants contend that no deposition transcripts exist, but object to producing written discovery, primarily on the grounds of relevance and confidentiality.

Although the prior lawsuit involved a different lease agreement, that lawsuit also arose out of damages sustained due to the 2010 Galleria fire. Information relating to the origin, cause and spread of the fire, resulting damages, and defendants' conduct with respect to the fire, which would likely be addressed in discovery, is relevant and discoverable in this action. Defendants' assertion that such discovery "may" constitute a breach of the confidential settlement agreement in the prior action, without further explanation, is not sufficient to sustain defendants' burden of justifying their objection. Defendants shall produce written discovery exchanged in the prior action by no later than August 2, 2013.

Plaintiffs' request that defendants be ordered to produce responsive documents in compliance with other written discovery responses is denied as moot, as defendants' assert in their opposition that they have produced all responsive documents in their possession, custody or control. Finally, defendants are ordered to provide a privilege log by no later than July 12, 2013.

**6. S-CV-0030815 Luebke, Roger, et al vs. Henrikson, Mark Alan**

Defendant and cross-complainant Ken Magee dba Ken Magee Co.'s Motion for Leave to File Cross-Complaint is granted. The cross-complaint shall be filed and served by no later than July 16, 2013.

If oral argument is requested, moving party's request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

**7. S-CV-0031130 Seuell, Michelle vs. Skim X Holdings, Inc., et al**

Appearance required on the continued hearing regarding plaintiff's writ of attachment.

**8. S-CV-0032335 Tapia, Frank vs. Dolkas, Thomas MD, et al**

Plaintiff's Motion for Leave to Amend Complaint is granted. The first amended complaint shall be filed and served by no later than July 16, 2013.

If oral argument is requested, the requests for telephonic appearance by Kindred Hospital Sacramento and Daisy Holdings, LLC are granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

**9. S-CV-0032447 Westwood Montserrat, Ltd. vs. AGK Sierra de Montserrat**

The parties' respective requests for judicial notice are granted. Defendants' Demurrer to the First Amended Complaint is overruled in part and sustained in part as set forth below.

Defendants' demurrer to each cause of action on the grounds that the Supplemental Declaration was extinguished upon foreclosure of the subject properties is overruled. Plaintiff alleges that the foreclosing entity Comerica Bank agreed to subordinate its mortgage lien to the Declaration of Covenants, Conditions and Restrictions ("CC&Rs"). While defendants point out that the Subordination of Lien refers only to "attached" CC&Rs, the definition of "Declaration" within the CC&Rs includes any amendments thereto. The court cannot determine at the pleading stage that the intent of plaintiff and Comerica Bank with respect to the Subordination of Lien could not, as a matter of law, include later amendments, including the Supplemental Declaration.

Defendants' demurrer to each cause of action on the grounds that the matter should be abated pending final determination of the "Westwood II" case is sustained. The court may not allow a second action to proceed if another pending action involves substantially the same controversy between the same parties arising out of the same transaction. *See Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574. Plaintiff in the Westwood II case seeks a declaration that it is the subject Development's Declarant. This determination could potentially bar each claim asserted in this case. It is in the interest of justice and avoidance of multiplicity of litigation to stay this action pending resolution of the Westwood II case (*Westwood Montserrat, Ltd. v. AGK Sierra De Montserrat*, Placer County Superior Court Case No. SCV-29131.)

The court reserves ruling on all other grounds for the demurrer at this time. An Order to Show Cause re Status of Stay is set for February 5, 2014 at 11:30 a.m. in Department 40.

**10. S-CV-0032511 Gould, Mark vs. American Home Mortgage Servicing, et al**

As a preliminary matter, the court notes that plaintiff filed a notice of non-stipulation to the commissioner on June 18, 2013. However, as the commissioner has previously presided over law and motion hearings in this case, plaintiff is deemed to have already stipulated to this commissioner for all matters other than trial per Local Rule 20.2(B). Plaintiff's notice of non-stipulation is untimely and ineffective.

Defendants' request for judicial notice is granted as to Exhibits A-J, and denied as to Exhibits K and L. Plaintiff's request for judicial notice is denied. *See L.B. Research & Education Foundation v. UCLA Foundation* (2005) 130 Cal.App.4th 171, 180, fn. 2 (contents of web sites subject to interpretation and for that reason not subject to judicial notice.) The court declines to consider numerous federal district court cases cited by defendants, as trial court decisions, either of the state or federal courts, are not precedential to this court. Defendants' Demurrer to the First Amended Complaint is sustained without leave to amend.

In opposition to the demurrer, plaintiff focuses on his allegations that entities involved in initiation of foreclosure proceedings against the subject property were not appropriately licensed to take such action. Plaintiff's conclusory allegations are not supported by fact or law. Based on documents of which the court may take judicial notice, defendants were authorized to initiate foreclosure proceedings based on plaintiff's default of his mortgage obligations under the deed of trust. The common law presumption that foreclosure proceedings have been conducted regularly and fairly may only be rebutted by substantial evidence of prejudicial procedural irregularity. *Melendrez v. D & I Investment, Inc.* (2005) 217 Cal.App.4th 1238, 1258. In this case, plaintiff fails to allege prejudice based on the purported deficiencies in the foreclosure proceedings. *See Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 94. Further, the first amended complaint ("FAC") fails to state a claim because plaintiff fails to allege tender. Any claim integrated with an allegedly irregular sale must fail unless the trustor can allege and establish a valid tender. *Arnolds Mgmt. Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 579. *Cal. v. Great W. Savings & Loan Ass'n* (1985) 165 Cal.App.3d 1213, 1222.

As noted by defendants, and undisputed by plaintiff, the FAC alleges at least four successive applications for a loan modification, including one which was granted, and a second one which was denied. The FAC does not allege a material change in the borrower's financial circumstances which was communicated to the mortgage servicer for purposes of compliance with Civil Code section 2923.6(g). Plaintiff also alleges a violation of Civil Code section 2923.5 predicated on the assertion that defendant American Home Mortgage Servicing, Inc. was not legally permitted to engage in discussions with plaintiff pursuant to the statute. As noted above, plaintiff provides no support for such assertions. Accordingly, plaintiff's first cause of action for violation of Civil Code sections 2923.5 and 2923.6(c) fails to state a valid cause of action.

Plaintiff's second cause of action for negligence and negligence per se fails to state a valid cause of action. In general, a lending institution does not owe any duty of care to a borrower where the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. *Nymark v. Heart Fed. Sav. & Loan Ass'n* (1991) 231 Cal.App.3d 1089, 1095-1096. There is no obligation on loan servicers to modify

borrowers' loans. *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 223. Nor does the FAC adequately allege negligence per se. Plaintiff provides no support for the contention that he was injured by defendant's purported violation of statute or regulation, that his alleged injury was the kind that the statute was designed to prevent, and that plaintiff was one of the class of persons the statute was intended to protect.

Plaintiff's third cause of action for promissory estoppel fails to state a valid cause of action. Plaintiff fails to allege a promise that was clear and unambiguous on its face. *Laks v. Coast Fed. Sav. & Loan Ass'n* (1976) 60 Cal.App.3d 885, 890. A promise to assess plaintiff's application for a loan modification is not a promise of any particular result. There is no obligation on loan servicers to modify borrowers' loans. *Mabry v. Superior Court, supra*, 185 Cal.App.4th at 223. Plaintiff states that he relied to his detriment on the promise to be assessed for a loan modification, but does not assert that he qualified for bankruptcy protection, that bankruptcy protection would have saved his home from the foreclosure process, or that defendants were aware of plaintiff's intention to file for bankruptcy, and made specific promises to them with the reasonable expectation that plaintiffs would rely on such promises to induce plaintiffs to forbear from pursuing bankruptcy. See *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 227-228.

The court presumes that the facts alleged in the FAC state the strongest case for plaintiff. *Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1286. Plaintiff bears the burden of demonstrating how the FAC may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. Plaintiff fails to make any showing that the FAC can be amended to change its legal effect. Accordingly, the demurrer is sustained without leave to amend.

**11. S-CV-0032587 Spindler, Robert vs. Ulmus Holdings, LLC, et al**

Defendants' expressly unopposed Petition to Compel Arbitration is granted. This court action shall be stayed pending arbitration. An Order to Show Cause re Status of Arbitration is set for March 4, 2014 at 11:30 a.m. in Department 40.

If oral argument is requested, the parties' requests for telephonic appearance are granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

**12. S-CV-0032749 Nole, Steven vs. Bank of New York Mellon, et al**

Defendants' request for judicial notice is granted. Plaintiff's request for judicial notice is denied. Defendants' Demurrer to the Complaint is sustained without leave to amend.

Each of plaintiff's causes of action fails because plaintiff fails to allege tender. Any claim integrated with an allegedly irregular sale must fail unless the trustor can allege and establish a valid tender. *Arnolds Mgmt. Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 579. *Cal. v. Great W. Savings & Loan Ass'n* (1985) 165 Cal.App.3d 1213, 1222. Each of plaintiff's claims stems from the assertion that defendant MERS did not hold an ownership interest in the

promissory note as a matter of law. Plaintiff provides no valid support for this contention, which is contradicted by documents of which the court may take judicial notice, as well as applicable law. See *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 271. Similarly, documents of which the court may take judicial notice demonstrate that defendant Recontrust Company was authorized to initiate foreclosure proceeding due to plaintiff's default of his obligation to make mortgage payments under the applicable deed of trust. Each cause of action stated in the complaint fails to state a valid claim as a matter of law.

Plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. A demurrer shall be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The complaint does not suggest on its face that it is somehow capable of amendment and plaintiff has failed to make any showing that it can be amended to change its legal effect. The demurrer is sustained without leave to amend.

If oral argument is requested, the parties' requests for telephonic appearance are granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

**13. S-CV-0032960 Gjerde, Sean vs. Northern California Law Center P.C.**

This tentative ruling is issued by the Honorable Mark S. Curry. If oral argument is requested, it shall be heard on July 2, 2013 at 8:30 a.m. in Department 32. Plaintiff's Application for Writ of Possession is denied without prejudice. The proof of service in the court's file indicates that plaintiff served defendant with the notice and application for writ of possession by mail on June 10, 2013. As defendant has not yet appeared in this action, defendant was required to be personally served with the application. Code Civ. Proc. § 512.030(b). Even if plaintiff was permitted to serve defendant by mail, the application was served with insufficient notice time. Code Civ. Proc. § 1005(a)(2), (b).

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